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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1950

No. 189

EDWIN J. SQUIRE,

Petitioner,

vs.

THE WHEELING & LAKE ERIE RAILWAY COMPANY,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO AND BRIEF IN SUPPORT THEREOF.

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No. .....

EDWIN J. SQUIRE,

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THE WHEELING & LAKE ERIE RAILWAY COMPANY,

Respondent.

PETITION FOR WRIT OF CERTIORARI.

To The Honorable the Supreme Court of the United States:

Edwin J. Squire, by Melvin L. Griffith, one of his attorneys in this cause, respectfully petitions this Honorable Court:

1. To review the judgment of The Supreme Court of Ohio in the above cause, which judgment was entered March 28, 1951 and became final upon the denial of Petitioner's application for rehearing on April 18, 1951 (R. 206, 207, 208, 218).
2. For the Writ of Certiorari to The Supreme Court of Ohio for that purpose.

In this behalf, Petitioner shows:

I.

SUMMARY AND SHORT STATEMENT OF THE MATTER INVOLVED.

This suit was brought by Petitioner in the Court of Common Pleas of Lucas County, Ohio against Respondent, under the Federal Employers' Liability Act,[1] and the Federal Safety Appliance Acts, Section 2 (R. 11, 12).[2]

After a motion to strike certain portions of the petition and to make certain portions more definite and certain (R. 6), an amended petition was filed (R. 10-13) with no important change in the matters alleged.

The answer of the defendant to the amended petition (R. 13) admitted plaintiff's employment; interstate commerce and transportation, and that plaintiff while so engaged, met with an accident on the 10th day of October, 1945 (R. 14).

It was denied that the accident happened in the manner described in the amended petition and that plaintiff was injured or damaged to the extent alleged. There was a general denial of all other allegations.

For a Second Defense, defendant alleged that prior to filing the suit, plaintiff, on the 28th day of December, 1945, settled and released his claim in consideration of the payment to him of the sum of $750 by the defendant (R. 15). A copy of the Release was attached to the answer as Exhibit "A" and made a part of the answer (R. 15). The Release was introduced in evidence at the trial as Plaintiff's Exhibit 12 (R. 179).

Plaintiff filed a Reply to the Second Defense (R. 16), and later, an Amended Reply (R. 17-21) in which plaintiff ad-

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[1] 35 Stat. 65, 45 U.S.C.A., 51-60.
[2] 36 Stat. 298, 45 U.S.C.A., 11.

mitted that he signed the release. In effect the Reply alleged fraud in the inducement of the Release or mutual mistake of fact, as grounds for avoiding the Release. The gist of plaintiff's attack on the Release is in Paragraphs 2 and 6 of the Reply (R. 18, 20).

The case was tried to Court and jury.

It was proved at the trial that Petitioner, at the time of the accident, October 10th, 1945, had been employed by Respondent, as a switchman, for about eighteen years (R. 23-24). Prior to the accident, his condition of health was good (R. 24) and he was a capable railroad man (R. 149, 151).

At the time of the accident, Petitioner was stationed on the running board of a box car (R. 27) for the purpose of passing signals from the conductor to the engineer in a switching operation (R. 28).

The movement stopped and Petitioner was required to remain at his station for a period of thirty minutes to an hour (R. 29). The temperature was in the thirties, a cold rainy, raw evening (R. 28-29). He got cold and moved around in his position on the running board to keep warm. He caught his toe on one of several screws that were protruding from the running board (R. 15); was thrown off balance and to prevent his falling head first to the ground, he jumped (R. 30).

He was taken to St. Vincent's Hospital, Toledo, Ohio, with a fractured os calcis in the right heel and other injuries (R. 31, 32, Plaintiff's Exhibit 7 R. 165, 167).

At the trial, Petitioner called two orthopedic surgeons as expert witnesses who verified the injuries shown by Plaintiff's Exhibit 7, connected them with the accident and testified that his disability to do railroad work was permanent (R. 50, 60, 76, 87-88).

On or about December 27, 1945, Respondent's Claim Agent, Farrel, visited Petitioner at his home. He told Petitioner that he had been talking with Dr. McCormick, Respondent's physician, who had treated Petitioner and that Dr. McCormick told him Petitioner's injuries were all healed and that he was able to go back to work. The Claim Agent said he wanted to get Petitioner's case cleared up before the end of the year and told Petitioner to see Dr. McCormick (R. 34).

Petitioner saw Dr. McCormick who told him; "Well, your injuries are all healed. There is no permanent impairment here. You will be perfectly able to go back to work (R. 35)."

It was in reliance upon these representations that Petitioner accepted the settlement and signed the release. The amount accepted was for time lost only, no part of the amount was for injuries received (R. 38).

At the close of plaintiff's case counsel for defendant moved (R. 155):

> "Mr. Hackett: Defendant moves the court to arrest the evidence from the jury and to direct the jury to return a verdict in favor of the Defendant. Defendant also moves the court to instruct the jury at this stage of the proceedings that the court finds as a matter of law that the release executed by plaintiff on or about the 27th day of December, 1945, is a valid release and a bar to any tort action which plaintiff has or claims to have."

The Court allowed the motion and instructed the jury to return a verdict for the defendant and against the plaintiff (R. 156).

There was a motion for a new trial which was denied and judgment was entered on the verdict returned in accordance with the Court's instruction (R. 156-517, 188-189).

There was an appeal from this judgment to the Court of Appeals of Lucas County, Ohio. That Court reversed, one of the grounds being that a jury question was presented on the issue of the validity of the Release executed by plaintiff and that the trial court erred in directing a verdict for the defendant (R. 193-201).

The Supreme Court of Ohio allowed an appeal by the defendant from the judgment of the Court of Appeals of Lucas County. The judgment of the Court of Appeals was reversed on grounds set forth in the syllabus in *Dice* v. *Akron, Canton & Youngstown Railroad Company,* 98 N.E. (2nd) 301, decided on the same day, March 28, 1951 (R. 207, 218).

The grounds for reversal of this case as stated in the syllabus by the court in the *Dice* case were (98 N.E. (2nd) at 302):

> "2. Where it is claimed that a release was induced by fraud (other than fraud in the factum) or by mistake, it is necessary, before seeking to enforce a cause of action which such release purports to bar, that equitable relief from the release be secured.
>
> "3. In such an instance, the issue, as to whether the person who signed the release was induced to do so by fraud or by mistake, is an issue for determination by the court.
>
> "4. While the court, in its discretion, may submit that issue to the jury under proper instructions, the finding of the jury in respect thereto is not binding upon the court.
>
> "5. Releases by railroad employees of rights arising under the Federal Employers' Liability Act stand on the same basis as the releases of others. (*Callen* v. *Pennsylvania R. Co.*, 332 U.S. 625, 68 S. Ct. 296, 92 L. Ed. 242, followed.)
>
> "6. Where the forum is a court of the state where such a release was made, the law of that state may determine the rights of the parties with respect to an effort to avoid the release.

"7. Such an effort to avoid a release relates to rights arising under the contract of release. (*Brown* v. *Western Ry. of Alabama*, 338 U.S. 294, 70 S. Ct. 105, 94 L.Ed. 100, distinguished.)

"8. Where a release which is not void is a release of rights of an employee under the Federal Employers' Liability Act, no question relating to rights under that act arises until the contract of release has been set aside.

"9. Questions as to the legal effect upon a right under the Federal Employers' Liability Act of a release executed in this state and questions as to the avoidance of such a release are to be determined in the courts of this state by the law of this state."

Application for rehearing was made in which it was urged (R. 223, 227):

1.

A Rehearing should be granted for the reason that the Court's decision is contrary to controlling decisions of the Supreme Court of the United States and United States Courts of Appeal on the same question.

2.

The decision in the *Squire* case, said to be required by the decision in the *Dice* case, is also contrary to the law as announced in both Ohio and Federal decisions, in that there was evidence to go to the jury.

The Application for a Rehearing was denied April 18, 1951 (R. 208).

II.

JURISDICTIONAL STATEMENT.

This Court's jurisdiction is invoked under Title 28 United States Code, Judiciary and Judicial Procedure, Section 1257 (3).

The judgment to be reviewed is a final judgment rendered by the highest Court of the State of Ohio in which a decision could be had.

The judgment is a decision as to rights, privileges and immunities specially set up or claimed by Petitioner under United States Statutes: The Federal Employers' Liability Act, 35 Stat. 65 (45 U.S.C.A., Sections 51-60), as amended, and The Federal Safety Appliance Acts, 27 Stat. 531 Sections 1-16, as amended with particular reference to Section 2, 36 Stat. 298 (45 U.S.C.A., Section 11).

The Supreme Court of Ohio has decided a Federal question of substance in a way probably not in accord with applicable decisions of this Court in *Garrett* v. *Moore-McCormick Co.*, 317 U.S. 239, 63 S. Ct. 246 and *Callen* v. *Penn. R. Co.*, 332 U.S. 625, 68 S. Ct. 296, as those decisions have been construed by United States Courts of Appeal in *Chicago & N. W. R. Co.* v. *Curl*, 178 F.(2nd) 497; *Graham* v. *Atchison, T. & S. Ry. Co.*, 176 F. (2nd) 819; *Irish* v. *Central Vermont Ry. Co.*, 164 F. (2nd) 837; *Thompson* v. *Camp*, 163 F. (2nd) 396; *Ricketts* v. *Penn. R. Co.*, 153 F. (2nd) 757 and is in conflict with these United States Courts of Appeal decisions on the question presented.

The decision is also in conflict with the decision of the highest Court of the State of Utah in *Kirchgestner* v. *Den-*

ver & R. G. W. R. Co., 218 Pac. (2nd) 685[3] and with decisions of California Courts of Appeal in *Pacific Electric Ry. Co.* v. *Dewey*, 95 C.A. (2nd) 69, 212 Pac. (2nd) 255 and in *Union Pacific R. Co.* v. *Zimmer*, 87 C.A. (2nd) 524, 197 Pac. (2nd) 363.

This lack of uniformity in administering federally created rights, calls for the exercise of this Court's jurisdiction for the purpose of establishing a correct and uniform rule to be applied by Federal and State Courts in cases arising under the two Federal Acts.

Brown v. *Western Railway of Alabama*, 338 U.S. 294, 70 S. Ct. 105, and Robertson & Kirkham, Jurisdiction of The Supreme Court of the United States, Ch. 47, Sections 368-373 (1951), supports this Jurisdictional Statement.

III.

QUESTIONS PRESENTED.

1. Are questions as to the legal effect upon a right of action arising under The Federal Employers' Liability Act of a Release of such cause of action before suit is brought and questions as to the avoidance of such a Release to be determined by a State Court of the State in which the Contract of Release has been executed and in which suit has been brought, in accordance with the law of that State, rather than in accordance with the law as announced in such cases by the Federal Courts?

2. If the law as announced by the Federal Courts in cases under the Act applies, then, since the sufficiency of the

[3] A rehearing was granted by the Supreme Court of Utah, 225 Pac. (2nd) 754, for the purpose of reargument on the question of the degree of proof. The sole question to be considered on rehearing is whether the evidence of an alleged mutual mistake of fact which will justify the jury in setting aside the release must appear by "clear and unequivocal" evidence or by "clear, unequivocal and convincing" evidence or only by a "mere" or a "fair" preponderance of the evidence.

evidence to present a jury question in such cases is a Federal question, was the evidence introduced at the trial, both as to the validity of the Release and as to the merits of the case, sufficient to require that the case be submitted to the jury?

This statement of the questions presented may be broken down into certain specific questions that are suggested by the Supreme Court of Ohio in its syllabus in the *Dice* case,[4] said by the Court to require a reversal of the *Squire* case:

1. In cases arising under The Federal Employers' Liability Act, where it is claimed that a Release has been induced by fraud (other than fraud in the factum) or by mistake, is it necessary, before seeking to enforce a cause of action arising under the Act which such Release purports to bar, that the Release be first set aside by a Court sitting in chancery?

2. In such cases, is the issue as to whether the employee who signed the Release was induced to do so by fraud or by mistake one for determination by the Court or does such issue present a question for the jury?

3. Does the Court in such cases have discretion to submit that issue to the jury under proper instructions and to treat the finding of the jury in respect thereto as advisory, only, and as not binding upon the court?

4. Does such a Release suspend or destroy all rights expressly or impliedly created by The Federal Employers' Liability Act, so as to permit it to be said that where such a release, which is not void, is a Release of rights of an employee under that Act, no question relating to rights under the Act arises until the contract of Release has been set aside?

5. Does the accident of the execution in a particular state of a Contract of Release of a federally created cause

[4] 98 N. E. (2nd) 301, 302.

of action give controlling effect to the law of the State rather than to the law as announced in federal decisions as applicable, where, in a suit in the courts of that State the Release has been pleaded as a defense to the federally created cause of action and the plaintiff seeks to avoid the legal effect of the Release on grounds of fraud in its inducement or of mistake?

IV.

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT.

The Ohio Supreme Court held that a reversal of this case was required by its conclusions reached in the *Dice* case.[5]

Reasons for allowing the writ here appear rather plainly on the face of the *Dice* opinion, portions of which, for the convenience of the Court, we place in a footnote.[6]

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[5] *Dice* v. *Akron, C. & Y. R. Co.*, 98 N. E. (2nd) 301. *Squire* v. *Ill. Wheeling & L. E. Ry. Co.*, 98 N. E. (2nd) 313.

[6] "(3) Where it is claimed that a release was induced by fraud (other than fraud in the factum) or by mistake, it is first necessary, before seeking to enforce a cause of action which such release purports to bar, that equitable relief from the release be secured. 45 American Jurisprudence, 711, Section 52. In such an instance, the issue, as to whether the person signing the release was induced to do so by fraud or by mistake, is an issue for determination by the court. *Meyer* v. *Meyer, supra.* See *Perry* v. *M. O'Neil & Co., supra.* While the court, in its discretion, may submit that issue to the jury under proper instructions, the finding of the jury in respect thereto is not binding upon the court. *Flynn* v. *Sharon Steel Corp., supra.* This was apparently the procedure followed in *Thompson* v. *Camp*, 6 Cir., 1947, 163 F. 2d 396, one of the cases relied upon by the plaintiff. See, also *Radio Corp. of America* v. *Raytheon Mfg. Co.*, 296 U.S. 459, 56 S. Ct. 297, 80 L.Ed. 327.

"In the instant case, the trial court did submit to the jury the issue as to whether the plaintiff was induced by fraudulent representations of the defendant or by mistake to execute the release. After the verdict of the jury, the court recognized its responsibility

Casual analysis of these portions of the Ohio Court's opinion in the *Dice* case, which furnishes the foundation

to determine that issue. The court was not bound by the jury's finding on that issue for the plaintiff. There was substantial evidence to sustain the finding for the defendant made by the court on that issue.

"However, plaintiff contends that the question, as to whether the release of an employee's claim under the Federal Employers' Liability Act should be set aside for fraud or mistake, must always be determined by the law as announced by the federal courts. In effect, this amounts to a contention that the law, with regard to releases of causes of action arising under the Federal Employers' Liability Act, differs from the law with regard to releases of other causes of action. In support of this contention, plaintiff relies upon certain decisions of the federal courts.

"We believe that a careful examination of those decisions will clearly disclose that they were based upon a misinterpretation, made by two judges of the Second Circuit Court of Appeals in *Ricketts* v. *Pennsylvania R. Co.*, 153 F. 2d 757, 164 A. L. R. 387, of the decision by the Supreme Court of the United States in *Garrett* v. *Moore-McCormack Co.*, 317 U.S. 239, 63 S. Ct. 246, 87 L.Ed. 239. This misinterpretation was subsequently rejected by the Supreme Court of the United States in *Callen* v. *Pennsylvania R. Co.*, 332 U. S. 625, 68 S. Ct. 296, 298, 92 L. Ed. 242.

* * *

"The basis for the decision in the *Ricketts* case appears in a statement by Circuit Judge L. Hand in his opinion and in a statement by Circuit Judge Frank in his concurring opinion. Thus, it was said by Judge Hand, 153 F. 2d at page 759: 'The right of action here in suit was created by act of Congress, and it is abundantly settled that its interpretation is a matter of federal law and not governed by state decisions, even when it speaks in the words of the common-law. *Chesapeake & Ohio Ry. Co.* v. *Kuhn*, 284 U. S. 44, 52 S.Ct. 45, 76 L.Ed. 157. *It would not inevitably follow that, after such a right had come into existence, the legal effect upon it of a transaction within a state—as here, of a release—was also to be treated as matter of federal law; conceivably, its fate might be left to the law of the state.* However, as we read *Garrett* v. *Moore-McCormick* (*McCormack*) *Co.*, (*supra*), this is not so. The right of action was there under the Jones Act, but the action had been brought in a state court, which had held that the burden of proof of establishing a release was governed by the law of Pennsylvania. This the Supreme Court denied, holding that the admiralty rule controlled; and it would seem to follow that the validity of the release at bar is to be decided by the common-law, to be gathered from the same sources which, before *Erie R.*

for the Court's reversal of the *Squire* case, reveals cogent reasons why the writ here should be allowed.

This Court has, for many years now, sought to establish

Co. v. *Tomkins* (*Tompkins*), 304 U. S. 64, 58 S. Ct. 817, 82 L. Ed. 1188, 114 A. L. R. 1487, we used to employ in cases depending on diversity of citizenship.' (Emphasis added.)

"It was said by Judge Frank, 153 F. 2d at page 760: 'The Supreme Court recently, in a case * * * relating to a release by a seaman, *Garrett* v. *Moore-McCormick* (*McCormack*) *Co.*, 317 U.S. 239, at page 248, note 17, 63 S.Ct. 246, 87 L.Ed. 239, has broadly hinted that the courts should treat non-maritime employees, with respect to releases of personal injury claims, just as they treat seamen. I think we should take that hint * * *.'

"In *Garrett* v. *Moore-McCormack Co.*, *supra*, it was pointed out that *under admiralty law*, the releases of seamen stand on a different basis from that of releases of others; and that, in enforcing a cause of action of such a seaman under a federal act which a state court is given jurisdiction by that act to entertain, the state court necessarily has to recognize 'the substantial rights of the parties under controlling federal law.' (317 U.S. 239, 63 S.Ct. 251.)

"(4, 5) As clearly pointed out in the *Callen* case, 'the releases of railroad employees stand on the same basis as the releases of others.' It would appear, therefore, that, so far as their releases are concerned, there are no substantial rights of railroad employees under controlling federal law. A release is merely a contract between the releasor and the releasee. As pointed out in the opinion of Mr. Justice Jackson in the *Callen* case, Congress has not undertaken to legislate with regard to the rights of railroad employees to make such a contract. Where the forum is the state where such a contract was made, there would appear to be no reason why the law of that state should not determine the rights of the parties with respect to an effort to avoid the contract.

"Plaintiff apparently believes that the question, as to whether the issue of fraud in the making of a release shall be determined by a court or by a jury, involves a procedural problem. In support of his contention that such question should be answered by the federal law, he relies on the case of *Brown* v. *Western Ry. of Alabama*, 338 U. S. 294, 70 S. Ct. 105, 106, 94 L. Ed. 100, holding that rights granted by the Federal Employers' Liability Act could not be interfered with by certain rules of practice and procedure of a state court.

"(6, 7) However, the question here is one of whether rights arising under an Ohio contract of release should or should not be recognized. It is not a question, as in the *Brown* case, relating to enforcement of rights under the Federal Employers' Liability Act.

and has succeeded in establishing a workable formula for bringing uniformity to the administration by federal courts of state created rights.[7] The Court has, since the enactment of The Federal Employers' Liability Act, been tireless in its efforts to impress upon State Courts the importance of the administration of the federal rights created by that Act in accordance with rules established by the Federal Courts.[8] Uniformity as between State and Federal Courts in the treatment of federally created rights is just as important and just as essential to justice as is uniformity in the treatment of state created rights.

The Ohio Supreme Court brushes aside decisions of United States Courts of Appeals and decisions of reviewing courts of other states by holding that those decisions:

> "were based upon a misinterpretation made by two judges of the Second Circuit Court of Appeals in *Ricketts* v. *Pennsylvania Rd. Co.*, 153 F. (2nd) 757, 164 A.L.R. 387, of the decision by The Supreme Court of the United States in *Garrett* v. *Moore-McCormick*, 317 U.S. 239, 87 L. Ed. 239, 63 Sct. 246. This misinterpretation was subsequently rejected by the Supreme Court

The latter question will not arise until the contract of release has been set aside. While, to use the words of Mr. Justice Black in the *Brown* case, a right provided for by the federal act 'cannot be defeated by the forms of local practice', the *Callen* case recognizes that such right may be barred by a release; and that the federal law has not, as in the case of seamen, put such a release of a railroad employee on a basis different from that of other releases. To use the words of Judge L. Hand in the *Ricketts* case, 'It would not inevitably follow that, after such a right (under the Federal Employers' Liability Act) had come into existence the legal effect upon it of a transaction within a state—as here, of a release—was also to be treated as matter of federal law; conceivably, its fate might be left to the law of state.' We believe that the Supreme Court in the *Callen* Case clearly indicated that its fate has been left to the law of the state."

[7] Frank J. Denny: Substance, Procedure and Uniformity—Recent Extensions of *Guaranty Trust Co.* v. *York*, 38 Georgetown Law Journal 115.

[8] *Garret* v. *Moore-McCormack Co.*, 317 U.S. 239, 63 Sct. 246; *Brown* v. *Western Ry. of Alabama*, 338 US. 294, 70 Sct. 105.

> of the United States in *Callen* v. *Pennsylvania Rd. Co.*, 332 U.S. 625, 92 L. Ed. 242, 68 Sct. 296."

This "misinterpretation" of Garrett has been accepted and followed by United States Courts of Appeal in all cases dealing with the question of the validity or invalidity of such releases since Ricketts was decided. Other State Courts of review have followed that lead. (See Cases Cited under Jurisdictional Statement).

The *Callen* case was reversed because the trial court had taken the question of the validity of the release in that case from the jury. The Ohio Supreme Court lifted out of its context Mr. Justice Jackson's expression in that case:

> "But until the Congress changes the statutory plan, the releases of railroad employees stand on the same basis as the releases of others"

and construed it to mean a rejection of the "misinterpretation."

The question under discussion which called forth the quoted expression by Mr. Justice Jackson, was that of burden of proof in the process of establishing the invalidity of a release. In that respect, the releases of railroad employees stand on the same basis as the releases of others. The burden of proof is on him who attacks the release. That is the only import of Mr. Justice Jackson's language.

The Ohio Court thus seeks to establish a "misinterpretation" in the *Ricketts* case by a misinterpretation of Mr. Justice Jackson's expression in the *Callen* case.

The practical effect of the decision of the Supreme Court of Ohio is to throw doubt on what this Court has decided; to introduce confusion in the administration of rights under these two Federal Acts and to destroy the principle of uniformity which this Court has sought so long and earnestly to establish.

It is for this Court to decide who has misinterpreted its decisions in *Garrett* and *Callen*. It is for this Court to resolve the resulting conflict of opinion on the vital questions presented, which in this case are Federal questions, since they affect, significantly, a federally created right.

These questions have arisen and are still arising in Courts all over the country. Every railroad man who brings his suit under the Act in a State Court may be confronted with this Ohio Court decision in similar circumstances. Many such cases are decided in trial courts which are likely to follow the *Squire* and *Dice* decisions or their own State Court decisions rather than the decisions of the Federal Courts or those of State Courts of review that follow the federal rule. The results will inevitably be a lack of uniformity in deciding these important questions, depending upon what forum is selected by an injured employee, who is not aware of these matters, in which to sue his case.

Finally, the decision of the Supreme Court of Ohio in this case has significance far beyond its effect upon the rights of this large and important group of railroad men. We believe that the Court's decision in this case, the reversal of which was said to be required by the syllabus in the *Dice* case, has so broadly challenged the supremacy of federal law governing in the administration of federally created rights that it furnishes the reason and the opportunity for this Court to settle once and for all the true relation of State Courts to the Federal Government and its Courts.

This Court, dealing with the enforcement of State law by Federal Courts in diversity cases, in *Cohen* v. *Beneficial Industrial Loan Corporation*, 337 U. S. 541, 69 Sct. 1221, said (69 Sct. at 1230):

> "This Court in *Erie R. Co.* v. *Tompkins*, 304 U. S. 64, 58 S. Ct. 817, 82 L. Ed. 1188, 114 A. L. R. 1487, held that judicial decisions are laws of the states

within its meaning. But *Erie R. Co.* v. *Tompkins* and its progeny have wrought a more far-reaching change in the relation of state and federal courts and the application of state law in the latter whereby in diversity cases the federal court administers the state system of law in all except details related to its own conduct of business. *Guaranty Trust Co. of New York* v. *York*, 326 U. S. 99, 65 S. Ct. 1464, 89 L. Ed. 2079, 160 A. L. R. 1231. The only substantial argument that this New Jersey statute is not applicable here is that its provisions are mere rules of procedure rather than rules of substantive law.

"Even if we were to agree that the New Jersey statute is procedural, it would not determine that it is not applicable. Rules which lawyers call procedural do not always exhaust their effect by regulating procedure."

Until this Court, in a decision as sweeping as those in the *Guaranty Trust* and *Cohen* cases, defines the relation of State Courts to the Federal Government where those Courts are dealing with federal law and federally created rights, with some such sharp precision as is to be found in those two decisions, this Court will continuously and constantly be called upon to deal with that question in piecemeal, as cases come in from the forty-eight States, with the inevitable result that few State Courts will add up the aggregate and come to any uniform conclusion in their administration of federally created rights.

For these reasons the writ should issue.

PRAYER.

Wherefore, for the reasons above given, Petitioner respectfully prays that a writ of certiorari be issued to the Supreme Court of the State of Ohio to the end that this cause may be reviewed and determined by this Court, that the judgment of the Ohio Supreme Court be reversed; that the judgment of the Court of Appeals of Lucas County be affirmed and for such other and further relief as the Court shall deem proper.

Respectfully submitted,

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BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

OPINIONS BELOW.

Court of Appeals of Lucas County, Ohio.

Squire v. *The Wheeling & Lake Erie Railway Company* (not published) January 16, 1950 (R. 193).

Supreme Court of Ohio.

Squire v. *The Wheeling & Lake Erie Railway Company* (R. 218-219), 155 O.S. 201, 98 N.E. 2nd 313.[9]

II.

JURISDICTIONAL GROUNDS.

The grounds on which the jurisdiction of this Court is invoked are:

1. Those set up under Title 28 United States Code, Judiciary and Judicial Procedure, Section 1257(3).

2. The Supreme Court of Ohio has, in a final judgment, passed upon questions of substance, arising under The Federal Employers' Liability Act and the Federal Safety Appliance Acts in a way probably not in accord with applicable decisions of this Court, in *Garrett* v. *Moore-McCormick Co.*, 317 U.S. 239, 63 S. Ct. 246 and *Callen* v.

[9] The decision in this case rests upon what is said in *Dice* v. *Akron, Canton & Youngstown R. Co.*, 155 O.S. 185, 98 N.E. (2nd) 301.

Penn. R. Co., 332 U.S. 625, 68 S. Ct. 296, as those decisions have been construed by United States Courts of Appeal in *Chicago & N. W. R. Co.* v. *Curl*, 178 F. (2nd) 497; *Graham* v. *Atchison, T. & S. F. Ry. Co.*, 176 F. (2nd) 819; *Irish* v. *Central Vermont Ry. Co.*, 164 F. (2nd) 837; *Thompson* v. *Camp*, 163 F. (2nd) 396; *Ricketts* v. *Penn. R. Co.*, 153 F. (2nd) 757 and is in conflict with those United States Courts of Appeal decisions on the questions presented.

The decision is also in conflict with the decisions of the highest Court of the State of Utah in *Kirchgestner* v. *Denver & R. G. W. R. Co.*, 218 Pac. (2nd) 685 [10] and with decisions of California Courts of Appeal in *Pacific Electric Ry. Co.* v. *Dewey*, 95 C.A. (2nd) 69, 212 Pac. (2nd) 255 and in *Union Pacific R. Co.* v. *Zimmer*, 87 C.A. (2nd) 524, 197 Pac. (2nd) 363.

This lack of uniformity in administering federally created rights, calls for the exercise of this Court's jurisdiction for the purpose of establishing a correct and uniform rule to be applied by Federal and State Courts in cases arising under the two Federal Acts.

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[10] A rehearing was granted by the Supreme Court of Utah, 255 Pac. (2nd) 754, for the purpose of reargument on the question of the degree of proof. The sole question to be considered on rehearing is whether the evidence of an alleged mutual mistake of fact which will justify the jury in setting aside the release must appear by "clear and unequivocal" evidence or by "clear, unequivocal and convincing" evidence or only by a "mere" or a "fair" preponderance of the evidence.

III.

STATEMENT OF THE CASE.

The accident in this case occurred at respondent's Ironton Yards at East Toledo, Ohio on the night of October 9, 1945 (R. 26, 29, Plaintiff's Exhibit 12, R. 179) while petitioner was in the course of his duties on what was known as the 3:30 P.M. Bum Job (R. 26). The accident happened at about ten or ten thirty o'clock at night (R. 117).

Petitioner and his fellow crew members were moving a cut of 23 cars from the connection point of the B. & O. R. Co., the Penn. R. Co., and the N. Y. C. R. Co. to respondent's Homestead Yard (R. 27). He was riding on the running board on a box car, the second car from the engine (R. 28). The running board was about 20 inches wide (R. 27). There were three six-inch boards with a space of about three-quarters of an inch between them that made up the running board (R. 28).

He rode there so as to be in a position to pass signals from the conductor to the engineer (R. 28).

The car on which he was riding was Wheeling & L. E. No. 27993. It was an old car, about 23 to 30 years old (R. 31, 147).

It was dark, rainy and cold (R. 28).

Petitioner, while waiting to pass signals, started to move up and down on the running board to keep warm (R. 29). In moving, he stubbed his toe on one of the screws designed to hold the running board securely in place, which had worked loose and was protruding about an inch above the surface of the running board, and lost his balance. He thought he was going off the car head

first. To prevent his falling head first, he jumped about twelve to fourteen or fifteen feet to the ground (R. 28, 29, 30, 49, 151).

When he hit the ground on his feet, he fell forward and struck his head on debris beside the track, fracturing the bones of his left heel and receiving injuries to his right ankle and cuts and bruises about his face and head (R. 30, 32, Plaintiff's Exhibit 7, R. 165).

Petitioner climbed back on the car and, with his lantern, counted nine screws protruding from one-half to one inch above the surface of the running board (R. 30). This testimony is corroborated by the witness, John Gurgin, one of the crewmen (R. 151).

He reported the accident to his conductor and was taken to St. Vincent Hospital in Toledo, Ohio, where he was placed in the charge of Dr. E. J. McCormick, respondent's regular physician (R. 30, 33). He was in the Hospital from October 10 to 15, when he was discharged to go home (R. 33). He was in casts, on crutches and used a walking cast for about six weeks (R. 33). He still wears a specially built shoe (R. 44, 45).

In reliance upon the statement of Dr. McCormick and upon the urging of Claim Agent Farrell to get his case settled before the first of the year (1946), he accepted $750.00 in settlement of his case, believing, as they had informed him, his "injuries were all healed"; that "there was no permanent impairment" and that he was "perfectly able to go to work" (R. 35).

He reported back to work December 28, 1945 (R. 38). He was unable to work (R. 38). He did not really learn his true condition until he saw, at the direction of Dr. McCormick, a Dr. Korman, a chiropractor. Dr. Korman told him he should look for another occupation (R. 39). He was

treated by Dr. Korman and was also seeing Dr. McCormick daily (R. 42). Dr. McCormick caused novocain to be injected into his ankle joints, strapped his back and sent him back to switch cars (R. 42). This deadened the pain for a while but soon wore off and the pain returned, as bad as ever (R. 42).

Petitioner, prior to the accident was a fast and efficient railroad workman (R. 149). After the accident he was awkward in getting on and off cars and so slow when he cuts one car off, he can no longer run up and catch the next one as it comes toward him (R. 149-151).

He uses his seniority rights to bid in the easier jobs and his fellow crew members assist him in his work (R. 45-46).

His injuries are permanent (R. 50, 60, 76, 87-88).

The foregoing facts were not disputed at the trial. Respondent produced no testimony. The Court directed a verdict for the defendant at the close of plaintiff's case (R. 154, 188).

Statutes Involved.

28 U.S.C.A. Section 1257(3):

"Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:

> (3) By writ of certiorari, * * * where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States."

45 U.S.C.A. Section 11:

"It shall be unlawful for any common carrier subject to the provisions of sections 1-16 of this title to haul, or permit to be hauled or used on its line, any car subject to

the provisions of said sections not equipped with appliances provided for in sections 11-16 of this title, to wit: * * * all cars requiring * * * secure running boards shall be equipped with such * * * running boards."

45 U.S.C.A. Section 51:

"Every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States and Territories, or between the District of Columbia and any of the States or Territories, or between the District of Columbia or any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce or, in case of the death of such employee to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee, and if none, then of such employee's parents and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engine, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment. Apr. 22, 1908, c. 149, Sec. 1, 35 Stat. 65; Aug. 11, 1939, c. 685, Sec. 1, 53 Stat. 1404."

IV.

SPECIFICATION OF ERRORS TO BE URGED.

The Supreme Court of Ohio erred:

1. In holding that questions as to the legal effect upon a right under The Federal Employers' Liability Act of a release executed in Ohio and questions as to the avoidance of such a release should be determined in Ohio Courts by Ohio law.

2. In holding that where it is claimed that a release was induced by fraud (other than fraud in the factum) or by mistake, it is necessary, before seeking to enforce a cause of action which such release purports to bar, that equitable relief from the release be secured.

3. In holding that in such an instance, the issue, as to whether the person who signed the release was induced to do so by fraud or by mistake, is an issue for determination by the court.

4. In holding that while the court, in its discretion, may submit that issue to the jury under proper instructions, the finding of the jury in respect thereto is not binding upon the court.

5. In holding that where the forum is a court of the state where such a release of a right of action created by The Federal Employers' Act was made, the law of that state may determine the rights of the parties with respect to an effort to avoid the release.

6. In holding that where a release which is not void is a release of rights of an employee under the Federal Employers' Liability Act, no question relating to rights under that act arises until the contract of release has been set aside.

7. In reversing instead of affirming the judgment of the Court of Appeals of Lucas County, Ohio.

V.

SUMMARY OF THE ARGUMENT.

A.

The evidence introduced at the trial, both on the merits and on questions as to the release, required the submission of the case to the jury.

B.

The question of the validity or the invalidity of a release of a federally created cause of action, where an effort is made in a suit filed in a State Court to avoid its effect on grounds of fraud or mistake, is to be determined in accordance with Federal rather than by State law.

VI.

ARGUMENT.

A.

The evidence introduced at the trial, both on the merits and on questions as to the release, required the submission of the case to the jury.

The evidence in the record as to how the accident happened set forth in our statement of facts above shows a clear violation of The Federal Safety Appliance Acts, 45 U.S.C.A., Section 11, requiring secure running boards.

The evidence as to the circumstances surrounding the execution of the release also clearly shows that Petitioner was induced to sign the release through fraud or mistake as to the serious nature of his injuries.

The sufficiency of the evidence to make a question for the jury under the Federal Act is a federal question.[10]

The question of the validity or invalidity of a release of a cause of action under the Federal Act is a question of federal law.[11]

Where a physician makes a statement to a layman as to his physical condition, it is a statement of a present fact and where such a statement made by the employer's physician is erroneous and is relied upon, the release may be set aside. Whether such a release was obtained through fraud or mistake is a question for the jury.[12]

The Supreme Court of Ohio erred in reversing instead of affirming the judgment of the Court of Appeals of Lucas County.

B.

The question of the validity or the invalidity of a release of a federally created cause of action, where an effort is made in a suit filed in a State Court to avoid its effect on grounds of fraud or mistake, is to be determined in accordance with Federal rather than by State law.

In *Ricketts* v. *Penn. R. Co.*, 153 F. (2nd) 757, a Federal Employers' Liability Act case, a release such as is here in question was pleaded as a bar to the action.

Judge L. Hand there made the following pronouncement (page 759):

> "The right of action here in suit was created by act of Congress, and it is abundantly settled that its interpretation is a matter of federal law and not governed by state decisions, even when it speaks in the words of the common-law. *Chesapeake & Ohio R. Co.* v.

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[10] *Brady* v. *Southern Ry. Co.*, 320 U.S. 476, 64 S.Ct. 232.

[11] *Chicago & N. W. R. Co.* v. *Curl*, 178 F.(2nd) 497, 501.

[12] *Graham* v. *Atchison, T. & S. F. R. Co.*, 176 F.(2nd) 819, 824, 825, 826.

Kuhn, 284 U.S. 44, 52 S.Ct. 45, 76 L.Ed. 157. It would not inevitably follow that, after such a right had come into existence, the legal effect upon it of a transaction within a state—as here, of a release—was also to be treated as matter of federal law; conceivably, its fate might be left to the law of the state. However, as we read *Garrett* v. *Moore-McCormack Co.*, 317 U.S. 239, 63 S.Ct. 246, 87 L.Ed. 239 this is not so. The right of action was there under the Jones Act, but the action had been brought in a state court, which had held that the burden of proof of establishing a release was governed by the law of Pennsylvania. This the Supreme Court denied, holding that the admiralty rule controlled; and it would seem to follow that the validity of the release at bar is to be decided by the common-law, to be gathered from the same sources which, before *Erie Railroad Co.* v. *Tompkins*, 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188, 114 A.L.R. 1487, we used to employ in cases depending on diversity of citizenship."

The *Garrett* case was brought in a State Court of Pennsylvania under Section 33, 46 U.S.C.A., Sec. 688, of the Jones Act, which incorporates the Federal Employers' Liability Act and gives to injured seamen the privilege of electing to bring his suit at law under that Act, instead of in Admiralty.

In that case a seaman was injured while working on a vessel traveling between the United States and European ports. He settled his case for $100 with the Ship Company's claim agent and signed a complete release of his cause of action.

He brought his suit under the Jones Act, 46 U.S.C.A., Sec. 688, in a Pennsylvania State Court. Defendant answered the Complaint and pleaded the release as an affirmative defense to the action.

The case was tried before Court and jury. There was a verdict for the paintiff for $3,000. On motion for judgment notwithstanding the verdict the Court set aside the

verdict and granted judgment for the defendant, not on an appraisal of the facts, but for the reason that plaintiff had not met the requirement of Pennsylvania law as to burden of proof to invalidate the release.

The Court took the position that since the plaintiff had chosen to bring his suit in a State Court, his case, on the release question, was governed by State law.

On appeal to the Supreme Court of Pennsylvania, that Court affirmed the lower court judgment on the theory that, although the law, as announced by the Federal courts, would apply to the substantative right of action, the rule of burden of proof on the release question did not affect his substantial rights, but was procedural and was to be determined by local law.

With the difference that the Ohio Supreme Court was influenced by the fact that the contract of release was made in Ohio, the conclusions reached are very similar to those reached by the Pennsylvania Court.

In reversing the judgment of the Pennsylvania Court this Court initiated the rule applied in the United States Court of Appeal in the cases we rely upon here.

The following excerpts from the opinion in the *Garrett* case are pertinent here on the question of whether the decision has been misinterpreted (63 Sct. 246):

> "(3, 4). We do not have in this case an effort of the state court to enforce rights claimed to be rooted in state law. The petitioner's suit rested on asserted rights granted by federal law and the state courts so treated it. Jurisdiction of the state court to try this case rests solely upon Sec. 33 of the Jones Act and upon statutes traceable to the Judiciary Act of 1789 which in 'all civil causes of admiralty and maritime jurisdiction' saves to suitors 'the right of a common-law remedy where the common law is competent to give it'. These statutes authorize Pennsylvania courts to try cases coming within the defined category. Whether

Pennsylvania was required by the acts to make its courts available for those federal remedies, or whether it could create its own remedy as to maintenance and cure based on local law, we need not decide; for having voluntarily opened its courts to petitioner, the questions are whether Pennsylvania was thereupon required to give to petitioner the full benefit of federal law and if so whether it failed to afford that benefit.

"(5) There is no dearth of example of the obligation on law courts which attempt to enforce substantive rights arising from admiralty law to do so in a manner conforming to admiralty practice. Contributory negligence is not a barrier to a proceeding in admiralty or under the Jones Act, and the state courts are required to apply this rule in Jones Act actions. *Beadle* v. *Spencer*, 298 U.S. 124, 56 S.Ct. 712, 80 L.Ed. 1082. Similarly, state courts may not apply their doctrines of assumption of risk in actions arising under the Act. *The Arizona*, 298 U.S. 110, 56 S.Ct. 707, 80 L.Ed. 1075; *Socony-Vacuum Co.* v. *Smith*, 305 U.S. 424, 59 S.Ct. 262, 83 L.Ed. 265. State courts, whether or not applying the Jones Act to actions arising from maritime torts, have usually attempted, although not always with complete success, to apply admiralty principles. The federal courts when treating maritime torts in actions at law rather than as suits in admiralty have also sought to preserve admiralty principles whenever consonant with the necessities of common law procedure.

"(6) This Court has specifically held that the Jones Act is to have a uniform application throughout the country, unaffected by 'local views of common law rules.' *Panama R. Co.* v. *Johnson*, 264 U.S. 375, 392, 44 S.Ct. 391, 396, 68 L.Ed. 748. The Act is based upon and in corporates by reference the Federal Employers' Liability Act, 45 U.S.C.A., Sec. 51 et seq., which also requires uniform interpretation. Second Employers' Liability Cases (*Mondou* v. *New York, New Haven & Hartford Railroad Co.*), 223 U.S. 1, 55 et seq., 32 S.Ct. 169, 177, 56 L.Ed. 327, 38 L.R.A., N.S., 44. This uniformity requirement extends to the type of proof necessary for judgment. *New Orleans & N. E. R. Co.* v. *Harris*, 247 U.S. 367, 38 S.Ct. 535, 62 L.Ed. 1167."

Page 251:

"(7-11) It must be remembered that the state courts have concurrent jurisdiction with the federal courts to try actions either under the Merchant Marine Act or in personam such as maintenance and cure. The source of the governing law applied is in the national, not the state governments. If by its practice the state court were permitted substantially to alter the rights of either litigant, as those rights were established in federal law, the remedy afforded by the state would not enforce, but would actually deny, federal rights which Congress, by providing alternative remedies, intended to make not less, but more secure. The constant objective of legislation and jurisprudence is to assure litigants full protection for all substantive rights intended to be afforded them by the jurisdiction in which the right itself originates. Not so long ago we sought to achieve this result with respect to enforcement in the federal courts of rights created or governed by state law. (*Erie R. Co.* v. *Tompkins*, 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188, 114 A.L.R. 1487.) And admiralty courts, when invoked to protect rights rooted in state law, endeavor to determine the issues in accordance with the substantive law of the State. So here, in trying this case the state court was bound to proceed in such manner that all the substantial rights of the parties under controlling federal law would be protected. Whether it did so, raises a federal question reviewable here under 237(b) of the Judicial Code, 28 U.S.C. 344 (b), 28 U.S.C.A. 344 (b)."

Pages 252-253:

"III. The Pennsylvania Supreme Court has concluded that in solving problems of procedural, as distinguished from substantive law, the law court may apply its own doctrine; and that the locus of burden of proof presents a procedural rather than a substantive question.

"(18) Much of what we have said above concerning the necessity of preserving all of the substantial admiralty rights in an action at law is incompatible with the conclusion of the court below. The right of the

petitioner to be free from the burden of proof imposed by the Pennsylvania local rule inhered in his cause of action. Deeply rooted in admiralty as that right is, it was a part of the very substance of his claim and cannot be considered a mere incident of a form of procedure. *Central Vermont R.* v. *White*, 238 U.S. 507, 511, 512, 35 S.Ct. 865, 866, 59 L.Ed. 1433, Ann. Cas. 1916B, 252; *Cities Service Oil Co.* v. *Dunlap*, 308 U.S. 208, 212, 60 S.Ct. 201, 202, 84 L.Ed. 196 and cf. *Lehigh Valley R. Co.* v. *Cornell Steamboat Co.*, 218 U.S. 264, 270, 31 S.Ct. 17, 18, 54 L.Ed. 1039, 20 Ann. Cas. 1235. Pennsylvania having opened its courts to petitioner to enforce federally created rights, the petitioner was entitled to the benefit of the full scope of these rights. The cause is reversed for action not inconsistent with this opinion."

To give the Court the unbroken development of the federal rule from the *Ricketts* decision to the latest decision by a United States Courts of Appeals on the subject, making the release question one for the jury and not one for the court, we quote from *Graham* v. *Atchison, T. & S. F. R. Co.*, 176 F.(2nd) 819, 824:

"These rulings are consonant with the general tendency to apply Federal law to all cases which call for the interpretation of Federal statutes creating rights. This works for uniformity. A contrary rule would be disastrous to the establishment of a jurisprudence on strictly Federal subjects. And this would be especially true in matters arising under the Federal Employers' Liability Act, where the employee may resort to the State courts to enforce his rights. If uniformity were not assured through the integrated Federal Judicial system, the employee would be subjected to the constant ebb and flow of local judicial opinion in the State where he may bring his action. Hence the logic of the attitude of the courts in this matter.

"In applying this principle, courts have held, in very recent years, that the validity of a release, entered into by an employee entitled to the benefits of the Federal Employers' Liability Act, is also governed by Federal law. While the Supreme Court has not

ruled on the question under this particular law, we have an analogous ruling made under the Merchant Marine Act, 46 U.S.C.A. 688, that a seaman's attack on the validity of a written release, was governed by Federal, not local law. *Garrett* v. *Moore-McCormack Co., Inc.*, 1942, 317 U.S. 239, 63 S.Ct. 246, 87 L.Ed. 239.

"Several courts of appeal—notably those for the second and sixth circuits—have taken their clue from this opinion and applied it to the Federal Employers' Liability Act. *Ricketts* v. *Pennsylvania R. Co.*, 1946, 2 Cir., 153 F.2nd 557, 164 A.L.R. 387; *Irish* v. *Central Vermont R.*, 2 Cir., 1947, 164 F.2d 837; *Thompson* v. *Camp*, 6 Cir., 1947, 163 F.2d 396.

* * *

"In the light of these principles, we conclude that plaintiff's attack on the release presented a factual situation which called for determination by a jury."

In accepting this interpretation of *Garrett*, the Supreme Court of Utah in *Kirchgestner* v. *Denver & R. G. W. R. Co.*, 218 Pac. (2nd) 685 said (Page 688):

"Since the legal effect of a release from liability arising under the Federal Employers' Liability Act is governed by federal law, we must determine the merit of the defendant's contention according to that law. *Ricketts* v. *Pennsylvania R. Co.*, 2 Cir., 153 F.2d 757, 164 A.L.R. 387; *Irish* v. *Central Vermont Railway*, 2 Cir., 164 F.2d 837; *Thompson* v. *Camp*, 6 Cir., 163 F.2d 396."

In accepting this interpretation of *Garrett*, the District Court of Appeal, Second District, Division 3, California, in *Union Pacific R. Co.* v. *Zimmer*, 197 Pac. (2nd) 363 said (Page 366):

"We are presented at the outset with the question of which law the California court should apply in determining the validity of this release, whether the law of the forum, the law of the place of execution, or federal law. Ever since the Supreme Court, in *Garrett* v. *Moore-McCormack Co.*, 317 U.S. 239, 63 S.Ct. 246,

87 L.Ed. 239, decided that the federal admiralty rule governed the burden of proof of establishing a release in an action brought in a state court under the Jones Act, 46 U.S.C.A. Sec. 688, it has been uniformly held that the validity and legal effect of a release from liability under the Federal Employers' Liability Act, 45 U.S.C.A., Secs. 51-60, are also governed by federal rather than state law. *Ricketts* v. *Pennsylvania R. Co.*, 2 Cir. 153 F.2d 757, 759, 164 A.L.R. 387; *Irish* v. *Central Vermont Ry.*, 2 Cir., 164 F.2d 837, 839; *Thompson* v. *Camp*, 6 Cir., 163 F.2d 396, 400. This rule is in harmony with the policy of uniform interpretation embodied in the established doctrine that general legal principles governing rights and liabilites under the Federal Employers' Lability Act are matters of federal law as to which the decisions of federal courts are controlling, *Chesapeake & O. R. Co.* v. *Kuhn*, 284 U.S. 44, 52 S.Ct. 45, 76 L.Ed. 157; *Weiand* v. *Southern Pac. Co.*, 34 Cal. App. 2d 500, 504, 93 P.2d 1023; *King* v. *Schumacher*, 32 Cal. App. 2d 172, 177, 89 P.2d 466, and we adopt it as a basis for the present decision."

Pacific Electric Ry. Co. v. *Dewey*, 212 Pac. (2nd) 255, was an action by the Railway Company for declaratory relief under a California Statute, as to the validity of a release it had pleaded as a defense in on a suit by Dewey under the Federal Employers' Liability Act to recover for his injuries. It set up the release executed by Dewey of his right of action under the Act and asked the Court to declare it valid.

In accepting this interpretation the Court said (Pages 256-257):

"The entertainment of an action for declaratory relief is within the discretionary power of the court (Code Civ. Proc. sec. 1061) and is not reviewable upon appeal except for an abuse of discretion. *Cutting* v. *Bryan*, 206 Cal. 254, 257, 274 P. 326; certiorari denied, 280 U.S. 556, 50 S.Ct. 16, 74 L.Ed. 611. Permission to resort to declaratory relief is a matter of sound dis-

cretion of the court. Such an action is usually unnecessary where an adequate remedy exists under some other form of action, *Bareham* v. *City of Rochester*, 246 N.Y. 140, 158 N.E. 51, 52; *James* v. *Alderton Dock Yards*, 256 N.Y. 298, 176 N.E. 401, 404; *Newburger* v. *Lubell*, 257 N.Y. 383, 178 N.E. 669, and was never intended to afford a sanctuary of escape from trying issues before a jury. *Utica Mut. Ins. Co.* v. *Beers Chevrolet Co.*, 250 App. Div. 348, 294 N.Y.S. 82, 86. The facts and circumstances with reference to the accident and the character of the place at which defendant was required to work and the appliances furnished to him by plaintiff are matters to be weighed and appraised by the jury and a right to a trial by jury is a part of the remedy afforded under the Federal Employers' Liability Act. *Bailey* v. *Central Vermont Ry.*, 319 U.S. 350, 353-354 63 S.Ct. 1062, 87 L.Ed. 1444, 1447-1448. The withdrawal of a release and whether it was executed under mutual mistake of fact is error. *Callen* v. *Pennsylvania R. Co.*, 332 U.S. 625, 628, 68 S.Ct. 296, 92 L.Ed. 242, 245. The court abuses its discretion when it assumes jurisdiction where another action or proceeding is pending between the same parties and involving the same issues, since an action cannot be maintained between the same parties to restrict the prosecution of a pending action in the same court unless it is manifest that full justice cannot be obtained in the first action. *Colson* v. *Pelgram*, 259 N.Y. 370, 182 N.E. 19, 21.

"Applying the foregoing rules, it is clear that the instant action cannot be maintained. It appears from the complaint that the release of defendant's claim for damages has been pleaded by the railway company in the previous action brought by defendant against the company. The effect of the release and all questions relating to it are proper matters to be determined by a jury when the action previously filed is brought to trial."

The Ohio Court has challenged this interpretation of the *Garrett* decision.

In seeking to support its view that all of these other courts have misinterpreted that decision, the court under-

takes to distinguish *Brown* v. *Western Railway of Alabama*, 338 U.S. 294, 70 Sct. 105.

It lifted an expression of Mr. Justice Jackson from its context in the *Callen* case and labels it a rejection by this court of the so-called misinterpretation by all other courts.

In accepting this expression, which merely meant that an injured railroad man like all other men was required to assume the burden of proving a release invalid, as authoritative support for its provincial view of the law governing the important issues in the case, the court claims that it has followed the *Callen* decision. It ignores the fact that *Callen* was reversed by the United States Court of Appeals and that that Court's judgment was affirmed by this court on the theory that it was palpable error for the trial court to take the issue of the validity of the release from the jury.

It is respectfully submitted that the Ohio Court has erred in every separate conclusion as announced in the Syllabus in the *Dice* case and that the decision in the *Squire* case which rests entirely upon those erroneous conclusions must be reversed.

CONCLUSION.

Petitioner therefore urges that the writ prayed for in the Petition be granted; that the decision of the Supreme Court of Ohio, be reviewed by this court; that its judgment be reversed and that the judgment of the Court of Appeals of Lucas County, Ohio, reversing the judgment of the Court of Common Pleas of Lucas County, Ohio, be affirmed.

Respectfully submitted.

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